Office-Supreme Court, U.S.
FILED
FEB 6 1981
ALEXANDER L. STEVAS,
CLERK

80-1327

Case Number 80-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ERNEST A. HUNTER, Petitioner ~~Appellant~~,

v.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ET AL ~~Appellee~~ Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION

NEW YORK CITY OFFICE
OF THE ATTORNEY GENERAL
2 World Trade Center
New York, New York 10047

ERNEST A. HUNTER
Petitioner-Counsel, Pro Se
2816 - 8th Avenue
New York, New York 10039
Telephone No. 368-1732

PETITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

ERNEST A. HUNTER, counsel pro se, the petitioner herein, prays that a writ of certiorari issue to review as follows:

QUESTIONS FOR REVIEW

Whether the petitioner has standing to assert a claim in this Court which emanates from a nonfinal judgment of a state court because his guaranties as protected by the Constitution of the United States are being abridged?

Whether the petitioner, having been denied the right to return to work from sick leave, due to loss of weight, since his initial request to return on or about December, 1978, has been denied due process under the laws of New York and the United States?[9]

Whether the petitioner, after alleging that the examination taken by him on or about December, 1979 for Probation Program Consultant was graded in such a manner as to be discriminatory against him, is entitled to relief if the aforementioned assertion is true pursuant to the equal protection of the laws provision of the Constitutions of New York State and the United States?

PROPER PARTIES

Petitioner requested disclosure pursuant to Article 31 of the civil practice law and rules to discover the proper parties respondent.

PETITION

Table of Contents

Please note that where there is a numerical insertion in the body of the petition, reference is being made to that numbered item as located in the Appendix.

1. Questions for Review
2. Proper Parties
3. Unofficial Reports
4. Jurisdictional Statement
5. Relative Applicable Laws
   (a) Federal Constitution
   (b) State Constitution
   (c) State Statutes
6. Statement of The Case
7. Judgment Below
8. Brief in Support of Petition
9. Conclusion

PETITION

Table of Authorities

PAGE

1. Federal Constitution: 14th Amendment 2-3
2. United States Code: 28 USC 1257(3) 2
3. State Constitution:
   - (a) Article 5, Section 6 [Civil Service] 3
   - (b) Article 1, Section 11 [Equal protection of law; discrimination in civil rights prohibited] 3
   - (c) Article 6, Section 3(5) [Jurisdiction of Court of Appeals] 3
4. State Statutes: Civil Practice Law and Rules
   - (a) Article 78, Section 7801 3-4
   - (b) Article 56, Section 5602(a) 4
   - (c) Article 31, Section 3102 4

   Civil Service Law
   - (d) Article 5, Section 77 4-5
   - (e) Article 5, Section 81(7) 5
   - (f) Part 55, Section 55.3 6

Unofficial Reports

The matter of Hunter *v.* New York State Department of Civil Service has only been reported unofficially in the New York Law Journal dated July 23, 1980, page 6, second column.

Jurisdictional Statement

The petitioner's petition was dismissed without prejudice effective July 18, 1980 by Judge Kassal, as to all provision therein except to provide for a hearing within 90 days from the date of the decision.[1] This decision was affirmed by Associate Justice Sullivan of the Appellate Division on September 30, 1980.[2] Chief Judge Cook of the Court of Appeals dismissed the request for permission to appeal on November 11, 1980.[3]

The United States Code: Section 1257 subsection (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statues of, or commission held or authority exercised under, the United States.

Relative Applicable Laws

Petitioner asserts the following constitutional provisions, statutes, ordinances, and regulations which this case involves:

Federal Constitution: 14th Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State, wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Constitution: Article 5, Section 6 [Civil Service] Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;

Article 1, Section 11 [Equal protection of law; discrimination in civil rights prohibited.] No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Article 6, Section 3, Subsection (5) [Jurisdiction of Court of Appeals] From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officer or a court of tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipuation for final order absolute.

State Statutes: Civil Practice Law and Rules, Article 78 Section 7801, Subsection 1 [Nature of Proceeding] Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination: 1. which is not final to a court or to some other body or

officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a hearing has elapsed;

Article 56, Section 5602, Subdivision (a)2. [Permission of appellate division or court of appeals.] (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application: 2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

Article 31, Section 3102, Subsection (f). Action to which state is a party. In an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person, except that it may be obtained only by order of the court in which the action is pending and except further that it may not include interrogatories or requests for admissions.

State Statutes: Civil Service Law: Article 5, Section 77 [Compensation of officers and employees reinstated by court order.] Any officer or employee who is removed from a position in the service of the State or of any civil division thereof in violation of the provisions of this chapter, and who thereafter is restored to such position by order of the supreme court, shall be entitled to receive and shall receive from the state or such civil division, as the case may be, the salary or compensation which he would have been entitled

by law to have received in such position but for such unlawful removal, from the date of such unlawful removal to the date of such restoration, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. Such officer or employee shall be entitled to a court order to enforce the payment of such salary or compensation. Such salary or compensation shall be subject to the provisions of sections four hundred seventy-four and four hundred seventy-five of the judiciary law for services rendered, but otherwise shall be paid only directly to such officer or employee or his legal representatives.

Article 5, Section 81, Subsection (7). Notwithstanding any other provisions of this chapter, the civil service department or appropriate municipal commission may disqualify for reinstatement and remove from a preferred list the name of any eligible who is physically or mentally disabled for the performance of the duties of the position for which such list is established, or who has been guilty of such misconduct as would warrant his dismissal from the public service, except that a partially physically handicapped person, who is suspended pursuant to section eighty of this chapter because of lack of work, but who, within six months of the date of his suspension, is certified for reinstatement to any job item having the same physical requirements as the job item from which the person was suspended shall not be disqualified because of his physical handicap unless a medical examination discloses that because his handicap has become greater he would not be able to satisfactorily perform in such job item. No person shall be disqualified pursuant to this subdivision unless he is first given a written statement of the reasons thereafter and an opportunity for a hearing at which such reasons shall be established by appropriate evidence, and at which such person may be represented by counsel and present evidence. The civil service department or municipal commission may designate a person to hold such hearing and report thereon.

Part 55, Section 55.3 [Pre-list review] The director of examinations or his designee may, by appropriate notice, invite candidate review of and the submission of objections with respect to a tentative rating key for short-answer written tests constituting all or part of an examination for the purpose of enabling a committee on appeals to recommend a final rating key which, upon approval by the commission, shall be applicable to all candidates. Such review may, but need not be limited to locations in Albany, Buffalo and New York City. The eligible list may be established pending consideration of the rating key by the commission, in which event objections to the tentative rating key filed by candidates shall constitute appeals to the commission. Every candidate shall be granted an opportunity to inspect his scored answer papers, or a photographic copy thereof, and the rating key and scoring tables in order to detect any errors in the application of such rating key to his answer sheet.

Statement of The Case

The petitioner is a citizen of the United States and a resident of the State of New York, residing at 2816 8th Avenue, New York City 10039. He completed educational requirements for Bachelor of Science and Bachelor of Laws degrees at Florida Agricultural and Mechanical University. He has been a member of the New York State Employees' Retirement since March 30, 1964, having transferred his membership from the New York City Retirement System. The petitioner served in the Army of the United States from January, 1952 until October, 1953. The petitioner was employed by the State of New York as a Narcotic Parole Officer March 30, 1970. He was promoted to Senior Narcotic Parole Officer effective October 12, 1972. Due to deemphasis in drug programing, the petitioner was reduced from Senior Narcotic Parole Officer, effective October 6, 1976 retroactive to August, 1976, to Narcotic Parole Officer; he was reduced from Narcotic Parole Officer to Drug Abuse Treatment Specialist I effective January, 1977.

The petitioner on or about July 20, 1978 relieved himself from work at Manhattan Community Based Center due to loss of weight. He requested to be reinstated on or about December, 1978, after his weight had stabilized. Petitioner was directed to take examinations during the month of January, 1979 before clearance could be had to actuate the procedure for his return. The petitioner complied with those requests and subsequent requests to keep medical and other appointments. Please note that at all times, the petitioner has averred his willingness to keep all appointments made pursuant to current policy. After an inordinate delay, petitioner was advised officially by letter dated March 19, 1979 signed by Mr. John Debes, Personnel Administrator, that he had failed the medical examination given by Dr. Fleisher, Associate Physician of the Employee Health Service on January 9, 1979 and the psychiatric examination given on January 16, 1979 by Dr. Singer. The petitioner has not to this date been given specific reasons for the determination reached to restrain him from his return to work. Dr. Francisco F. Merino examined the petitioner February 14, 1980, his diagnosis was that petitioner had "Long Standing Schizophrenic Paranoid Reaction with elements of deterioration".

Except for the general conclusions reached by Dr. Merino from the examination given February 14, 1980 the petitioner has yet to be given specific factors involving the effectiveness or lack of it in this instance of his work product which gives rise to the basis for the firing. Please note that there must be a causative correlation between the firing and the work situation. It is deemed essential that it be established that the petitioner could no longer do his job in a substantial and functional manner before any action could be taken. The petitioner avers that he did his job better than in a substantial manner. There can be no doubt the time for a hearing has long since passed to give any lawful application to the provisions of Section 81.7 of the Civil Service Law. The petitioner took an examination on or about Dececber, 1979 for Probation Program Consultant.

An appeal was taken after being advised that he had failed. The petitioner received a reply dated June 24, 1980 indicating that his final score was 66. He alleged in his amended petition, filed on June 30, 1980, that the method used to grade the test did not meet the constitutional requirements of equal protection of the laws. That one review group of the candidates had the benefit of the examination questions and answers and their answer sheet with which they had an opportunity to rebut the State's established answers before the grading of the examination, where as the petitioner was afforded only his answer sheet to compare with the established civil service answer sheet after the grading of the examination.

Judgment Below

The allegations of unconstitutional acts were raised at every stage in the proceedings: the original petition filed May 22, 1980; the amended petition filed June 30, 1980; the reply filed June 30, 1980 to the answer of the Civil Service Commission's answer by way of reference to the original petition; petitioner's memorandum filed June 30, 1980; on appeal to the Appellate Division as assignments of error; on appeal to the Court of Appeals as assignments of error. The petitioner's original and amended petition was dismissed without prejudice effective July 18, 1980, except that a hearing was ordered within 90 days from the date of Judge Kassal's memorandum decision, granting same pursuant to Section 81.7 of the Civil Service Law on at least 15 days written notice. It is parenthetically stated that to this date no such notice of a scheduled hearing has been received by the petitioner, however, he has received a reply from Mr. Robert Bazyk[15] dated August 6, 1980 which gave him the opportunity to request a specific date for a hearing to be held at his request and a reply from Mr. Paul J. Vella[16] dated October 7, 1980 which advised him if he did not request a hearing that it would be assumed that he waived his rights to same. That his name would be permanently removed from the preferred list for the position of

Narcotile Parole Officer effective October 24, 1980. The petitioner since on or about December, 1978 has remained ready, willing and able to return to work. Those medical sources known to the petitioner, Dr. Furman Jones, Life Extension Institute and Presbyterian Hospital, have not found him to be disabled.

Brief in Support of Petition

This proceeding was commenced under Articles 78 and 31 of the Civil Practice Law and Rules to attempt to arrive at a just solution of the problem. Petitioner sought a ruling on the pleading by the Court of first instance because the circumstances of the case were shrouded in Equity. He is well aware of the importance of the governmental interests and has given them every opportunity to preserve those interests. However, in this instance no reasonable person can assert candidly that the balance stays with the State infinitely. The State cannot continue to deny the constitutional claims of the petitioner based upon the illusory findings that he failed a psychiatric evaluation. Since December, 1978 the Civil Service Commission has been unable or unwilling to provide a solution to the problem. Unless the State can provide evidence and confront the petitioner with this evidence in an adversary proceeding where he might rebut same, they have no standing to deny him his constitutional right to return to work even if he did fail the psychiatric evaluation. The emotional condition referred to must be such as to seriously affect the petitioner's ability to perform his job responsibilities. Assuming that the provision of Section 81.7 of the Civil Service Law was applicable in this instance, the Civil Service Commision would still be liable to the petitioner for they have not provided the necessary hearing to lawfully effectuate that removal. It is noted that until the closing of Manhattan Community Center on or about May, 1979, the petitioner was employed but on sick leave due to loss of weight. It was from this status that petitioner took examinations, both medical and psychiatric, to be restored from sick leave to active employment[9] and

therefore the provisions by which he was originally denied the right to return to work could not be the provisions of the Section 81.7 as noted in Judge Kassal's decision. However, it does not matter exactly what provision was used in this instance as no justifiable reasons can be advanced for not resolving the matter since December, 1978. It is noted that there are no precedents in Equity proceedings, however, the petitioner requests this Court to take Judicial Notice of the fact that any appellate court should exercise its judicial power to correct gross miscarriages of justice.

Therefore it is requested:

1. That petitioner be restored to the State's payroll.

2. That petitioner be assigned the highest grade from which he was unlawfully dismissed.

3. That petitioner be given benefit of all attendant rights as they relate to his restoration to payroll.

4. That the Court lift the veil to determine culpability of the Civil Service Commission in their individual capacities and as a unit.

5. That the circumstances by which the examination was graded be reviewed.

Respectfully submitted,

ERNEST A. HUNTER
Petitioner-Counsel, Pro Se
New York, New York 10039
2816 - 8th Avenue
Telephone No. 368-1732